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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CHEMEHUEVI TRIBE OF INDIANS, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

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In accordance with this Court's Rule 42, Edison Electric Institute has received the written consent of counsel for all other parties to file this brief *amicus curiae*. Copies of the consents have been filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 190 operating companies which

supply electricity to 77.6 percent of all the electric service customers in the United States. This brief is submitted in support of the brief being filed by the Solicitor General for the Federal Power Commission.

The decision below[1] would impose Federal Power Commission licensing jurisdiction on the use of cooling water by thermal-electric generating plants, if the water is found by the FPC to be "surplus water" drawn from either of two sources: a reservoir behind a dam operated by an agency of the Federal Government, or any portion of a river located downstream from a Government dam.[2] A substantial number of the estimated 876 thermal power plants planned for construction and operation between 1970-1990 will draw cooling water from one of these two sources.[3]

EEI believes that the decision below would produce an unworkable and totally unnecessary federal regulatory scheme, which could not be coordinated with the present federal-state regulation of power plant siting and operations. The resulting interagency conflict would create another obstacle impairing the ability of the electric utility industry to continue to provide the nation with an adequate supply of electric energy.

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[1] Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207 (D.C. Cir. 1973).

[2] A modern 1000 megawatt fossil-fueled plant with a "once-through" cooling system requires a water flow through the condenser of about 1500 cubic feet per second. FPC, 1970 National Power Survey, pt. I, at I-1-25 (1971).

[3] *Id.* at I-1-17, Table 1.2. During the period 1970-1990, it will be necessary virtually to quadruple the industry's present generating capacity to meet projected demand.

Approximately 700 major dams are currently operated by federal agencies.[4] Jurisdictional confrontations between those agencies and the FPC are assured if the decision below is permitted to stand. A formal license application to the FPC would be required to determine two issues: whether "surplus water" would be available for a proposed power plant and, if so, whether it should be used for cooling purposes or committed to competing uses. Resolution of those issues would inevitably require substantial delays in the approval of construction sites for new electric generating plants. Individual utilities would be faced with one more uncertainty in the planning process, not accompanied by offsetting regulatory benefits.

EEI submits that protracted jurisdictional disputes between the FPC and other agencies could not be avoided if the FPC is required to implement the lower court's mandate. By imposing on the Commission a new licensing function, the court has also created a new regulatory process with built-in conflicts.[5] For example, in determining the availability of "surplus water" either at a Government dam or at a down-

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[4] Included in this category are TVA-operated hydroelectric facilities, flood control and multiple-purpose dams operated by the U.S. Army Corps of Engineers, and storage dams operated by the Department of the Interior Bureau of Reclamation. Approximately 500 additional dams are operated by the Corps of Engineers and the Bureau of Reclamation for navigational and water diversion purposes.

[5] The lower court stated:

> "[I]t is apparent that *in every case* involving a contention of the applicability of the 'surplus water' clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam." 489 F.2d at 1241 (emphasis supplied).

stream location, the FPC would be required initially to decide whether it would be bound by the "surplus water" determination of another federal agency either operating the dam or controlling the consumptive use of the water. The issue would be decided without benefit of a statutory or judicial definition of "surplus water." If the FPC asserts jurisdiction to decide the issue in a particular case and finds "surplus water" to be available, the determination either to grant a license for use as cooling water, or to deny the license on the ground that the water should be committed to other uses, would require an FPC incursion into the jurisdiction and expertise of other federal agencies, particularly the Department of the Interior and the Environmental Protection Agency. Interagency conflict would be the certain result.

Such jurisdictional disputes, EEI believes, would inevitably create further delays in power plant siting decisions and construction schedules at a time when many electric utilities have recently been forced to postpone or cancel planned construction for financial reasons. These actions have raised serious questions about the adequacy and reliability of future electricity supplies.[6]

The question before the lower court was raised with reference to the Colorado River System; however, the

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[6] The current plight of the electric utilities and its effect on electricity supplies are matters of growing national concern. The Senate Interior Committee has announced an investigation of the growing financial problems of the electric utilities. The investigation will include, among other things, an examination of the factors causing reductions in utility construction programs, and a study of the consequences of a substantial decline in reserve generating capacity and system reliability. 120 CONG. REC. S13875 (daily ed. July 31, 1974).

court's holding applies to all rivers in the United States.[7] If this Court should limit its decision to holding that the FPC lacks jurisdiction over the six named electric plants, then the broader jurisdictional question would remain unresolved, and the decision below would continue to apply to Government dams on all rivers other than the Colorado. For this reason, and for the reasons stated in the arguments below, EEI urges this Court to hold explicitly that Section 4(e) of the Federal Power Act[8] does not impose FPC licensing jurisdiction on the use of "surplus water" by thermal-electric generating plants.

SUMMARY OF ARGUMENT

EEI believes that the decision below imposes on the FPC licensing jurisdiction not authorized by the Federal Power Act. The lower court's construction of the "surplus water" clause and the resulting extension of FPC jurisdiction cannot be reconciled either with this Court's analysis of the Commission's jurisdiction in *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), or with the lower court's own analysis of the legislative history and purposes of the original Federal Water Power Act.[9]

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[7] Accordingly, in May 1974 a complaint was filed with the FPC citing the decision below and requesting that the FPC exercise jurisdiction over the use of "surplus water" by a proposed thermal-electric generating plant in Oklahoma. Otoe-Missouria Tribe of Indians v. Oklahoma Gas & Electric Co., FPC Dkt. No. E-8833 (filed May 31, 1974). The Indian complainants were represented by the attorneys for the complainants herein. There is no reason to doubt that additional complaints will be filed relating to power plants in other areas of the nation.

[8] 16 U.S.C. § 797(e) (1970).

[9] Act of June 10, 1920, ch. 285, 41 Stat. 1063.

Since the first year of its existence, the Federal Power Commission has consistently held that it lacks jurisdiction to license steam-electric generating plants. The decision by the Court of Appeals reverses that 54-year-old rule with respect to plants using "surplus water." It ignores a pattern of legislation going back to 1906 expressly granting jurisdiction over the disposition of "surplus water" to other Government departments and agencies.

The legislative history of the Federal Water Power Act reveals the error in the lower court's construction of the "surplus water" clause. It also confirms that the Court of Appeals properly interpreted the "project works" clause of Section 4(e). The court correctly held that the term "project works" does not include thermal-electric generating plants and that the FPC therefore does not have licensing jurisdiction over such plants.

I.

THE LEGISLATIVE HISTORY OF THE "SURPLUS WATER" CLAUSE DEMONSTRATES THAT THE LOWER COURT'S LITERAL INTERPRETATION OF THE CLAUSE IS ERRONEOUS.

The legislative history of the Federal Water Power Act extends back six years from the date of its enactment and is rich with statements demonstrating that the words "surplus water" in Section 4(e) of the Act were intended to refer to water not needed for navigation to be used for the production of hydroelectric power at Government navigation dams.[10] The legislative history clearly reveals that Congress had no inten-

[10] A detailed description of the legislative history of the "surplus water" clause is set forth in the briefs filed by the Solicitor General and Arizona Public Service Co., *et al.*

tion to regulate the use of "surplus water" in thermal-electric generating plants. The decision below does not discuss this portion of the legislative history. Indeed, the lower court erroneously concluded that "there apparently is no useful legislative history" of the clause. 489 F.2d at 1236. The fact is, however, that the congressional intent has been plainly expressed, and therefore, this Court has a duty to give effect to that intent. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962).

The "long and colorful" legislative history of the Federal Water Power Act discloses "a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 171 (1946). The primary goal of the Act was the development of water power which would serve as a substitute for the power from steam-electric generating plants, thereby reducing demand for the limited supplies of fossil fuels. *FPC* v. *Union Elec. Co.*, 381 U.S. 90, 99 (1965). This primary purpose of the Act is simply not compatible with the notion that Congress was also concerned with creating a licensing requirement relating to the operation of steam-electric generating plants. In the absence of an unmistakable directive, the "surplus water" clause should not be construed in a manner which runs counter to the broad goals which Congress intended to accomplish in enacting the Federal Water Power Act. *See FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

The court below concluded that "the language of the 'surplus water' clause does indeed mean what it says." 489 F.2d at 1237. That literal reading of the statutory language should not be allowed to stand.

When the literal interpretation of statutory language produces an unreasonable result "plainly at variance with the policy of the legislation as a whole," this Court has followed the congressional purpose, rather than the literal words. *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543 (1940); *see Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972).

II.

THE DECISION BELOW FAILS TO REFLECT THE LIMITATION OF FPC JURISDICTION DETERMINED BY THIS COURT IN TAUM SAUK.

In construing the "surplus water" clause of Section 4(e) of the Federal Power Act,[11] the court below has extended FPC jurisdiction far beyond the concerns that prompted Congress to enact the original Federal Water Power Act in 1920. The decision of the Court of Appeals is inconsistent with this Court's finding in the *Taum Sauk* case, *FPC* v. *Union Electric Co.,* 381 U.S. 90 (1965), that an "obvious distinction" removes steam-electric generating plants from the regulatory scheme contemplated by Congress in 1920.

In *Taum Sauk,* it was held that Section 23(b) of the Federal Power Act[12] requires an FPC license for construction of a pumped-storage hydroelectric project utilizing the waters of a non-navigable river subject to federal jurisdiction to generate electricity for interstate transmission. The argument was made there that if FPC licensing jurisdiction is based on the interstate transmission of energy, there can be no basis for distinguishing between a steam-electric plant and a

[11] 16 U.S.C. § 797(e) (1970).

[12] 16 U.S.C. § 817 (1970).

hydroelectric facility, if each generates electricity for interstate transmission and uses water subject to federal jurisdiction. This Court rejected that argument, finding that the two types of generating plant are distinguishable on the basis of the "central concern" of the Act:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U.S. at 110.

This distinction provides the barrier preventing a jurisdictional leap to all steam-electric plants generating electricity for interstate transmission and using cooling water over which Congress has jurisdiction. It does not result from any intricate construction of the language of Section 23(b). Rather, it is found in the "central concern" of the original Federal Water Power Act.

In construing the "surplus water" clause of Section 4(e), the court below expressly found that no such distinction exists. After observing that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power," 489 F.2d at 1242, the court concluded:

> "At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.*

Support for that conclusion was not derived from the legislative history of the Federal Water Power Act.

Indeed, as noted above, the court below concluded that "there apparently is no useful legislative history." 489 F.2d at 1236. Moreover, the lower court also found that "there is little in the way of extrinsic illumination of the congressional purpose in enacting the 'surplus water' clause." *Id.*

The decision below refers to pre-1920 Supreme Court cases and acts of Congress relating to the federal leasing and sale of surplus water power. The lower court's historical analysis includes only one explicit reference to congressional interest in control of water uses unrelated to water power. In 1917 Congress created a Waterways Commission which was empowered to coordinate and plan virtually all aspects of water resources development.[13] Noting that the Federal Water Power Act explicitly repealed the act creating the Waterways Commission, the Court of Appeals assumed that all of the broad duties granted to the Waterways Commission were simply relocated in the FPC. That assumption is inconsistent with the purposes of the Federal Water Power Act described by this Court in *Taum Sauk,* and it is also contradicted by the lower court's own exhaustive account of the Federal Water Power Act's legislative history contained in the portion of the decision construing the "project works" clause of Section 4(e). The Act of 1917 provides no valid historical basis for assuming that Congress, in enacting the Federal Water Power Act, was concerned with the use of surplus water unrelated to its use for hydroelectric power.

The Court of Appeals relied extensively on the legislative history of the Federal Water Power Act in finding that the FPC lacks jurisdiction under the "project

[13] Act of August 8, 1917, ch. 49, 40 Stat. 250.

works" clause. However, the lower court abruptly abandoned its analysis of the legislative history when it turned to the "surplus water" clause in the same section of the Act. The result was a literal construction of the clause which is plainly erroneous when juxtaposed with the court's own earlier descriptions of the legislative history:

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power.
>
> * * *
>
> "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness." 489 F.2d at 1222-23, 1231.[14]

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[14] The court's conclusions are well supported by excerpts from the legislative history cited in the decision.

> "The industrial expansion . . . has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 percent since 1914. This increase . . . has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. . . .
>
> "*While the form of bill which has been presented for your consideration is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry."

Letter dated Feb. 27, 1918 from Secretaries of War, Interior, and Agriculture transmitting H.R. 8716, 65th Cong., 2d Sess. (1918) (emphasis supplied).

> "The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the mine itself and operate all in great interstate systems."

Report from Secretary Houston to the House, H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

Having made these observations, the court below proceeded to ignore them in construing the "surplus water" clause, insisting that no useful legislative history exists to explain the congressional purpose in enacting that clause.

The Court of Appeals, in applying relevant legislative history to only one of the two clauses construed in the decision below, has injected into its decision a massive inconsistency. The error is compounded by the lower court's failure to consider the substantial legislative history addressed specifically to the "surplus water" clause.

III.

THE DECISION BELOW MISREADS THE EFFECT OF FEDERAL LEGISLATION AUTHORIZING OTHER AGENCIES TO DISPOSE OF "SURPLUS WATER".

In its analysis of the background of the Federal Water Power Act, the court below noted earlier legislation, particularly the 1906 amendment to the Reclamation Act,[15] empowering the Secretary of the Interior to dispose of surplus water from a Government reclamation dam. 489 F.2d at 1238-39. The Court of Appeals also noted a series of post-1920 statutes containing similar grants of authority. 489 F.2d at 1241. From that pattern of legislation, the lower court erected the premise that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency." 489 F.2d at 1242. From that premise, the Court of Appeals proceeded to the conclu-

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[15] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

sion that Congress intended the FPC to exercise that control.

The contrary conclusion more readily squares with the statutory pattern. Congress has repeatedly designated other agencies to lease or sell surplus water. For what purpose would it confer upon the FPC a redundant power to authorize the same uses? More sensible is the construction that Congress intended a division of authority, with the appropriate Secretary empowered to dispose of the surplus water, and the FPC chartered to license the construction of any "project works" to make use of that water. In that reading, of course, the "project works" required to be licensed would be limited under *Taum Sauk* to hydroelectric projects. Therefore, if there is no hydroelectric project, there would be no need to seek an FPC license.

A second incongruity is raised by the lower court's conclusion that "Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." 489 F.2d at 1242. If so, why did Congress repeatedly after 1920 pass legislation conferring that power upon other agencies? We think that the enactment of those subsequent laws provides further evidence of the fact that Congress had no intention in 1920 to grant plenary authority to the Federal Power Commission to license the use of "surplus water."

CONCLUSION

For the foregoing reasons, this Court should reverse that portion of the decision below imposing FPC licensing jurisdiction over the use of "surplus water" by thermal-electric generating plants.

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